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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH WILKEY,

Defendant and Appellant.

C058192

(Super. Ct. No. 07F06298)

A jury convicted defendant Kenneth Wilkey of possession of methamphetamine and possession of heroin. The trial court found true allegations that defendant had three prior prison terms. Sentenced to five years in state prison, defendant appeals his conviction. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 26, 2007, around 6:40 p.m., Sacramento Police Department Officers John Harshbarger, Jammi Mezzanares, and Bales drove to a trailer park looking for defendant who was on parole. At the trailer park, Officer Harshbarger saw defendant, whom he recognized from a photograph, standing in the road about

20 to 25 feet away, and 10 feet from a blue Ford pickup truck (the truck).

The officers approached defendant in an unmarked black Crown Victoria, equipped with dashboard lights that were visible from the outside. The officers were not in uniform, but wore "raid" vests marked with the word "POLICE" on the front and back in bold yellow letters. Defendant made eye contact with each of the officers and his eyes widened, appearing concerned and startled.

Defendant walked quickly toward the tailgate area of the truck. As he did, Officer Harshbarger saw defendant was "cupping" a small, dark object in his hand, which he dropped into the bed of the truck near the driver's side taillight. Keeping his eyes on defendant, Harshbarger and the other officers got out of the car.

Having seen a woman standing near the cab of the truck, the officers immediately contacted both the woman and defendant. As he approached the woman, later identified as defendant's niece, Betty Rios, Officer Harshbarger observed her attempting to hide a one-inch by one-inch "drug bindle" in her waistband. Based on his observation and experience, Harshbarger believed the bindle contained crystal methamphetamine. Both defendant and Rios were detained.

Officer Harshbarger then went to search the area of the truck where he had seen defendant throw the dark object. In doing so, he found a "dark-colored satchel bag" the size and

shape of which were consistent with the object he had seen defendant drop into the truck. Harshbarger observed there were no other items in that area of the truck bed that he could have confused for the item defendant had been holding.

Inside the bag, Officer Harshbarger found a brass canister with the word "aspirin" stamped on the top and four empty one-inch by one-inch drug bindles. Inside the canister was one drug bindle containing a black, tar-like substance that Harshbarger recognized as heroin, and three bindles containing a white substance, which Harshbarger recognized as methamphetamine.

Officer Mezzanares searched Rios and found a glass pipe, commonly used for smoking methamphetamine, in Rios's bra. Officer Bales searched defendant, calling out to his fellow officers that he found a cell phone and a \$20 bill. Rios then "blurted" out that the drugs in her hand were hers, and the \$20 bill on defendant was money she owed him, though she refused to say what the money was for. Defendant and Rios were both arrested.

Defendant was charged with possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a), and possession of heroin in violation of Health and Safety Code section 11350, subdivision (a). The complaint further alleged under Penal Code section 667.5, subdivision (b), that defendant previously served three prior prison terms. Jury trial began on December 26, 2007.

At trial, the parties stipulated that three of the bindles found in the canister stamped "aspirin" contained methamphetamine, with net weights of 0.28 grams, 0.24 grams, and 0.19 grams. They also stipulated that the fourth bindle contained heroin with a net weight of 0.55 grams.

In his defense, defendant claimed the drugs were not his. He testified that when he first saw the officers he did not realize they were police officers, and the object he dropped into the back of the truck was a crushed Pepsi can, not a bag of drugs. He argued the bag of drugs found by Officer Harshbarger could have been thrown into the truck by anyone in the trailer park, given that the truck was immobile and essentially used by the neighborhood as a garbage can. He also claimed the \$20 Rios had given him was repayment for a loan he had made a couple of days prior. The jury did not believe defendant's version of events, and found him guilty as charged.

After a court trial on his prior prison terms, defendant was sentenced to an aggregate term of five years in state prison. Defendant also was ordered to pay various fines and fees. Defendant appeals his conviction.

DISCUSSION

On appeal defendant makes one claim of ineffective assistance of counsel and two claims of evidentiary error. Finding that none of defendant's claims has merit, we shall affirm.

I

Defendant claims he received ineffective assistance of counsel because trial counsel failed to object to a portion of Officer Mezzanares's testimony on the ground that it violated defendant's Sixth Amendment right to confront witnesses. Defendant also claims the trial court erred in admitting that same testimony, which he argues is hearsay, under the spontaneous declaration exception.

Neither of these claims has merit because any error in admitting the testimony was harmless and, thus, any failure to object to the testimony on Sixth Amendment grounds did not prejudice defendant. The relevant testimony by Officer Mezzanares is as follows:

"[PROSECUTOR]: During the course of searching Miss Rios and searching [defendant], did Miss Rios blurt anything out?

"[MEZZANARES]: Yes, she did.

"[PROSECUTOR]: What did she say?

"[MEZZANARES]: She said that the drugs were hers and the \$20 was money that she owed to [defendant].

"[PROSECUTOR]: Did she say specifically what drugs were hers?

"[DEFENSE COUNSEL]: Objection; hearsay.

"THE COURT: Come over here for a minute.

"(In-chambers conference not reported.)

"THE COURT: I will overrule the objection to that question."

Subsequently, the court questioned Officer Mezzanares:

"[THE COURT]: Had you or some other officer, had you become aware when you were talking to the female whose name was--

"[MEZZANARES]: Betty Rios.

"[THE COURT]: Had you become aware before she made her comment that the officers had found a \$20 bill in the pocket or on the person of the defendant?

"[MEZZANARES]: Yes.

"[THE COURT]: And had you communicated that information in some way, or the officers called it out so that the female would have heard a reference to a \$20 bill?

"[MEZZANARES]: Yes, and that's when she made her statement.

"[THE COURT]: That's your understanding or your suspicion as to why she made her comment?

"[MEZZANARES]: Yeah. She was trying to explain it to me.

"[THE COURT]: She was trying to explain the \$20 bill, but she had heard about the \$20 bill?

"[MEZZANARES]: Yes, sir."

Assuming, without deciding, that it was error to allow Officer Mezzanares to testify regarding the statement Rios made, we conclude any error did not prejudice defendant. We analyze for prejudice under the harmless beyond a reasonable doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

Officer Harshbarger testified that he saw defendant holding a small dark object, which, when defendant saw the officers, defendant dropped into the back of the truck. When Harshbarger searched the area of the truck where defendant dropped the dark object, he found a small dark bag containing heroin and methamphetamine. Harshbarger testified there was nothing else in the back of the truck that resembled in size, color, or shape the object defendant dropped into the truck.

Defendant's only defense was that he did not at first realize Officer Harshbarger and the others were police officers, and the only thing he threw into the back of the truck was a crushed Pepsi can. The jury was free to disbelieve defendant's self-serving testimony and infer, from Harshbarger's testimony, that defendant threw the drugs into the back of the truck in order to avoid being caught. Further, Rios's blurted statement to Officer Mezzanares appeared to exculpate defendant. Given these circumstances, there was no reasonable probability that the jury would have returned a more favorable verdict had the court excluded Mezzanares's testimony.

Defendant's claim that the length of the jury's deliberations "mandates" a finding by this court that the decision was hard fought, does not change this result. The jury was sent to deliberate at 3:55 p.m., after closing arguments were made. They were sent home half an hour later, at 4:30 p.m. The following morning at 9:10 a.m., the jury asked for a read-back of everyone's testimony, except the prosecution's expert.

It is unclear whether the jury continued its deliberations until the read-back began at 11:05 a.m. At 2:30 p.m., the jury began again to deliberate. One hour later, at 3:30 p.m., a verdict was reached.

This is not, as defendant describes, a lengthy deliberation. Indeed, all told, the deliberations took no more than four hours. Accordingly, even if the length of a jury's deliberations ever could, this jury's deliberations do not "mandate" a finding by this court that without the Rios statement, a verdict more favorable to defendant would have been reached.

Because any error in admitting Officer Mezzanares's testimony was harmless, it is axiomatic that counsel's failure to object to the testimony on Sixth Amendment grounds did not result in prejudice to defendant.

II

Defendant also claims the trial court erred in admitting evidence that defendant possessed the methamphetamine and heroin for sale when he was charged only with possession. Specifically, defendant claims the evidence is improper evidence of "other crimes" under Evidence Code section 1101, subdivision (b), and that any probative value of the evidence was outweighed by its prejudicial impact on the jury under Evidence Code section 352. Defendant objected to this testimony at trial, but failed to state on the record, the basis for his objection and the court did not specify the basis for its ruling. Defendant

is, therefore, limited on appeal to arguing the testimony was irrelevant. (See *People v. Riggs* (2008) 44 Cal.4th 248, 289 [trial court lacks discretion to admit irrelevant evidence].)

To convict defendant of possession, the prosecution was required to prove: (1) defendant exercised control over or the right to control an amount of a controlled substance; (2) defendant knew of its presence; (3) defendant knew of its nature as a controlled substance; and (4) the substance was in an amount usable for consumption. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.)

Here, in order to meet its burden, the prosecution offered expert testimony from Sacramento Police Department Detective Jeff Morris, an expert in simple possession of methamphetamine and heroin, as well as possession of these drugs for sale. Detective Morris testified that 0.28 grams of methamphetamine and 0.55 grams of heroin, the amount of methamphetamine and heroin found in the brass canister, were "usable quantit[ies]." In response to the prosecution's questions, Morris also explained that someone carrying narcotics, particularly someone in the business of selling them, would, upon seeing a police officer, want to dispose of them in order to avoid arrest.

Then, in response to a hypothetical proposed by the prosecution, Detective Morris explained that methamphetamine, packaged in three separate baggies containing 0.28 grams, 0.24 grams, and 0.19 grams respectively, could be packaged either for sale or personal use. However, as he further testified, if the

person carrying those separate baggies was not also carrying a pipe or some other device used to ingest the narcotics, it was more likely he or she was selling them.

In closing, the prosecution argued that Detective Morris's testimony proved defendant possessed a usable quantity of methamphetamine and heroin, either for personal use or to sell. Because possessing a usable amount is an element of the crime of possession, Detective Morris's testimony was relevant for this purpose alone.

His testimony also was relevant to show that defendant knew he possessed contraband. Whether, as the prosecution argued, defendant was selling the drugs to Rios, the fact that the drugs were packaged as if for sale and defendant disposed of them as soon as he saw the police officers, supports another element of the crime of possession--knowledge that the drugs were illegal. Accordingly, the trial court did not err in admitting Detective Morris's testimony.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, Acting P. J.

HULL, J.